No. 87-73 (6)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

KATHERINE B. NICHOLS, etc.,

Petitioners,

—v.—

DON RYSAVY, *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE AND BRIEF OF MARVIN MAYPENNY, MARGARET NORCROSS, WINONA LADUKE, EDNA EMERSON LITTLEWOLF, AUGUSTUS BROWN, SERAPHINE MARTIN AND ANISHINABE AKEENG AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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AMICI CURIAE

MARVIN MANYPENNY, MARGARET NORCROSS, WINONA LADUKE, EDNA EMERSON LITTLEWOLF, AUGUSTUS BROWN, SERAPHINE MARTIN and ANISHINABE AKEENG hereby respectfully move for leave to file the attached brief as amici curiae in this case. The consent of the various counsel for petitioners was sought, however, due to the large number of parties to the present action, and the

reluctance of any one to speak for all, consent of all counsel has not yet been obtained.[1] Consent letters from the office of the Solicitor General, the Attorney General of the State of South Dakota and Counsel for petitioners, have been obtained and have been forwarded to the Clerk of the Court under separate cover.

The interest of amici arise from the fact that they are enrolled members of the White Earth Band of Indians of Minnesota and members of Anishinabe Akeeng, an organization of White Earth Indians whose purpose is to promote the return of formerly White Earth lands to Indian ownership. Three of the named amici are presently among the plaintiffs in Manypenny v. United States, Civ. No. 4-86-

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[1]According to the Petition for Certiorari, there are 28 named parties to this action. See Petition at ii.

770, a civil action brought in United States District Court for the District of Minnesota to obtain damages and quiet title to allotted lands which were forfeited and transferred by allottees in violation of the restrictions of the trust patent allotments. The Eighth Circuit's holding in Nichols v. Rysavy, 809 F.2d 1317 (8th Cir. 1987), that the United States is an indispensable party in a suit by Indians to quiet title to trust land held by third parties, casts a shadow on the claims of the amici who are plaintiffs in Manypenny. As the Manypenny case falls within the jurisdiction of the Eighth Circuit, the interests of amici in Supreme Court review of the Nichols case is both real and substantial. Amici Edna Emerson Littlewolf, Augustus Brown, Seraphine Martin and Anishinabe Akeeng are plaintiffs in Littlewolf v. Hodel, Civ. No. 87-0822, a civil action filed in the

U.S. District Court for the District of Columbia Circuit challenging the constitutionality of the White Earth legislation. Their case may also turn on this Court's review of the Eighth Circuit decision.

In the instant case, it is believed that the argument contained in the brief submitted by amici will assist in establishing that the decision of the Eighth Circuit in Nichols is seriously flawed, that correction by this Court is essential, and that this issue is substantial. If this argument is accepted, it would be dispositive of the case.

Respectfully submitted,

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Brief Amici Curiae in support of the petition for certiorari seeking review of the decision of the Court of Appeals for the Eighth Circuit in Nichols v. Rysavy, 809 F.2d 1317 (1987).

Interest of Amici

The amici are six enrolled members of the White Earth Band of Indians of Minnesota and Anishinabe Akeeng (The People's Land), an organization of White Earth Indians having the purpose of returning lands within the White Earth Reservation to Indian ownership. The individual amici and the members of Anishinabe Akeeng are allottees or heirs of allottees who have claims to land within the Reservation now held by others as the result of forfeitures and transfers of title that violated the restrictions of the trust patents for the allotments. Marvin Manypenny, Margaret Norcross and Winona LaDuke are among the plaintiffs in an action brought in the District Court for Minnesota to quiet title to allotted trust lands and obtain damages and other relief (Manypenny, et

al., v. United States, et al., Civil No. 4-86-770. Amici Edna Emerson Littlewolf, Augustus Brown, Seraphine Martin and Anishinabe Akeeng are plaintiffs in Littlewolf v. Hodel, Civ. No. 87-0822, a civil action filed in the U.S. District Court for the District of Columbia Circuit challenging the constitutionality of the Whate Earth legislation. The holding in Nichols that the United States is an indispensable party in a suit by Indians to quiet title to trust land held by third parties casts a shadow on the claims asserted by the amici who are plaintiffs in Manypenny and on the parallel claims which the amici who are plaintiffs in Littlewolf seek to preserve from extinction on their own behalf and on behalf of a class of thousands of other White Earth Indians. All of these claims must be brought in the District Court for Minnesota and therefore are subject to the jurisprudence of the Eighth Circuit.

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REASONS FOR GRANTING THE WRIT AND SUMMARY OF ARGUMENT

The decision of the Court of Appeals that the United States is an indispensable party in suits by Indians to recover trust or restricted lands from third parties, where the loss of the land resulted from unauthorized acts of the federal government, flies in the face of long established law, conflicts with decisions of this Court and the courts of other circuits, and deals a death blow to the claims of untold thousands of Indians who have suffered injury at the hands of a government which holds itself out as a fiduciary for its Indian wards. Review by this Court is urgent.[1]

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[1] In focusing on the indispensable party issue, we do not imply any lack of support for the other grounds for review urged in the Petition.

The argument will first examine the capacity of Indians to sue on their own behalf to protect or recover trust lands, and will then discuss the cases which establish that the United States is not an indispensable party to such suits brought against third parties. It will differentiate the situations where the United States is an indispensable party, and conclude with an analysis of the Nichols case.

ARGUMENT

I. SINCE IT IS CLEARLY ESTABLISHED THAT INDIANS MAY SUE ON THEIR OWN BEHALF TO PROTECT OR RECOVER TRUST LANDS, THE UNITED STATES IS NOT AN INDISPENSABLE PARTY TO SUITS BY INDIANS TO PROTECT OR RECOVER TRUST LANDS

1. Indians May Sue On Their Own Behalf To Protect Or Recover Trust Lands

As early as 1912 this Court, in upholding the authority of the federal government to bring suit to cancel conveyances of allotted land made in

violation of restrictions on alienation, noted that the "allottee may be permitted to bring his own action, or, if so brought, the United States may aid him in its conduct..." Heckman v. United States, 224 U.S. 413, 446 (1912). Ten years later the Court implicitly recognized this right in Ewert v. Bluejacket, 259 U.S. 129 (1922), a suit by the heirs of an allottee to invalidate their ancestor's sale of restricted land to a "person employed in Indian affairs."

More recently, in Poafpybitty v. Skelly Oil Company, 390 U.S. 365 (1968), this Court unanimously rejected a challenge to the standing of Comanche Indians to bring a suit in the Oklahoma state court alleging breach of oil and gas leases of allotted lands, made with the approval of the Secretary of the Interior and subject to his supervisory authority. Beginning with the

implications of Heckman, the opinion canvassed the intervening decisions sustaining the capacity of restricted Indians to sue on their own behalf and concluded:

> The existence of the power of the United States to sue upon a violation of the lease no more diminishes the right of the Indian to maintain an action to protect that lease than the general power of the United States to safeguard an allotment affected the capacity of the Indian to protect that allotment.

390 U.S. at 373-374

2. The United States Is Not An Indispensable Party To Suits By Indians To Protect Or Recover Trust Lands

In none of the cited cases, nor in any of the cases relied on by the Court in Poafpybitty, does the objection appear to have been made that the United States was an indispensable party. Although the illegal sale in Bluejacket had been approved by the Secretary of the Interior, the only issues treated in the

opinion are the application of the statutory prohibition to a special assistant to the Attorney General and the defense of laches. On the government's role in promoting the "grave mischief" sought to be prevented by the statute, the Court merely commented:

> Any error by the department in their interpretation of the statute cannot confer legal rights inconsistent with its express terms.

259 U.S. at 138.

The first case that appears to have fully considered the question of the indispensability of the United States as a party is Chocktaw and Chickasaw Nations v. Seitz, 193 F.2d 456 (10th Cir. 1951), cert. denied, 343 U.S. 919 (1952), an action to recover tribal lands in which the United States was named as a third party but withheld its consent to be joined. Reviewing Heckman and other Supreme Court cases that had recognized

the right of Indians to maintain actions with respect to their lands, the court found that this Court's language clearly had reference to suits to which the United States was not a party, and reasoned that the Indians' right to sue would be "of no avail" to them if the United States were an indispensable party. 193 F.2d at 459-460. It acknowledged that the United States, if not joined, would not be bound by a judgment for the defendants, whose title would therefore remain under a cloud, but concluded:

> We are of the opinion that the equities presented by the situation and the inconveniences that will result to the Nations, if they are denied the right to prosecute an action, and to the defendant, if the Nations are permitted to prosecute the action without the joinder, weigh heavily in favor of the Nations.

193 F.2d at 461.

The following year, in Jackson v. Sims, 201 F.2d 259 (1953), the Tenth Circuit reaffirmed the holding of Chocktaw and Chicasaw Nations v. Seitz in an action to enjoin mining operations under a sublease of restricted land that had been approved by the Secretary of the Interior over the protest of a majority of the Indian owners. The court distinguished cases, such as condemnation suits, where the effect might be to alienate Indian land, from those where the effect

> would protect Indian land against alienation, particularly where the Secretary refused, refrained or neglected to protect the Indian's interest. Here, the suit is on behalf of the Indians to protect the title to the Indian lands against an attempted alienation with the approval of the Secretary. If Section 2 of the 1939 Act is construed to prohibit the subleasing without the consent of a majority of the Indian owners, approval of the same by the Secretary is beyond his statutory authority and no governmental function

would be impaired by granting the relief sought.

201 F.2d at 262.

Until the decision below, these two leading cases have been followed without exception in every Circuit where the indispensability of the United States has been raised as a defense in an action by Indians to protect or recover trust or restricted lands. Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251, 1254-55 (9th Cir. 1983), cert. denied, 465 U.S. 1049 (1984) (quiet title action, "rule is clear in this Circuit and elsewhere); Bird Bear v. McLean County, 513 F.2d 190, 191, n.6 (8th Cir. 1975) (damages for trespass); Fort Mojave Tribe v. LaFolette, 478 F.2d 1016, 1017-18 (9th Cir. 1973) (quiet title action); Skokomish Indian Tribe v. France, 269 F.2d 555, 560 (9th Cir. 1959) (quiet title action); Oneida Indian Nation of New York v. County of Oneida, 434 F.Supp.

527, 544-45 (N.D.N.Y. 1977) (damages for illegal use of aboriginal land); Mashpee Tribe v. New Seabury Corp., 427 F.Supp. 899, 903-04 (D. Mass. 1977) (recovery of aboriginal land); Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp., 418 F.Supp. 798, 809-13 (D.R.I. 1976) (recovery of aboriginal land); see 3A Moore's, Federal Practice, ¶19.09[8] at 19-195-96 (2d ed. 1986).

The rule was recently endorsed by this Court in United States v. Mottaz, 106 S.Ct. 2224 (1986). In holding that the waiver of immunity granted by 28 U.S.C. §345 extended only to suits seeking an original allotment, the Court noted that §345 does confer jurisdiction on the federal courts to entertain suits by Indians to quiet title to land previously allotted. 106 S.Ct. at 2231, n.9. It went on to say:

> To hold that in all cases brought under §345 the United States must be named as a party defendant would restrict the access to federal courts afforded Indians raising claims or defenses involving their land entitlements because the United States would obviously not be a proper party in many private disputes that relate to land claims originally granted by various allotment acts.

Id. The Court cited Vicenti v. United States, 470 F.2d 845 (10th Cir. 1972), cert. dismissed, 414 U.S. 1057 (1973), as a case in which the Indian plaintiffs sought recovery of title from private parties though their suit for damages against the United States was held barred by sovereign immunity. In Vicenti, the plaintiffs alleged that the Bureau of Indian Affairs had prevailed on them or their predecessors to surrender their allotments in exchange for lands which they never received. The court of appeals noted the district court's expression of regret "that there was no

damage claim available to the appellants because either the Bureau of Indian Affairs, the Bureau of Land Management, or the Department of the Interior had allowed a 'cruel hoax' to be perpetrated against them." 470 F.2d at 847.

Thus, until the decision of the court below, it was settled law that the United States is not an indispensable party to suits by Indians to protect or recover trust or restricted lands. In only two classes of cases must the United States be joined: (1) suits to alienate such lands and (2) suits seeking an original allotment. The Nichols case does not fall into either of these classes.

II. THE DECISION BELOW IS BOTH WRONG AND UNJUST

The fourteen cases consolidated on appeal in Nichols were brought by the descendants of allottees who had lost their land through sale or foreclosure

after being issued fee simple patents in the years 1916-1921 by Secretary of the Interior Franklin K. Lane without having made an individual determination of the allottee's competency to manage his property and without having received an application therefore or the consent of the allottee - so-called "forced fee patents." Secretary Lane had purported to act under the authority of the Burke Act of 1906, 25 U.S.C. §349, but his successor in office discontinued the practice as violating the intent of the Act and releasing property from trust status without warrant of law.

In reaching its holding that the United States, which had refused to su on behalf of the plaintiffs, was an indispensable party, the court of appeals noted that "if appellants prevailed in this suit, the United States would be reinstated as trustee over the land, with

the concomitant resumption of fiduciary responsibility, and could also be subject to claims for damages by the present owners." (Pet. App., p. 37) But reinstatement of the United States as trustee occurs in every successful suit by Indians to recover trust land; this reason would destroy the Indians' independent right to sue. And a judgment for the plaintiffs could not subject the government to liability, for, as recognized in all the cases permitting suit in its absence, it would not be bound by the judgment.

The court of appeals also argued that the result of the suit, if allowed to proceed to the merits, "would depend entirely on whether the United States acted legally or illegally in granting fee patents under the blood quantum policy," and its liability cannot be "'tried behind its back.'" Id. But in

Bluejacket the government had approved an illegal sale of land; in Jackson v. Sims the government was alleged to have illegally approved a mining sublease; and in Vicenti, which the court of appeals describes as "sharply contrast[ing] with the present case," the government had perpetrated a "cruel hoax" on the Indian plaintiffs.

The factors stressed by the court of appeals do not differentiate this case from those in which it has been uniformly held that the United States is not an indispensable party. The only Indian case that the court cites in support of its position is Antoine v. United States, 637 F.2d 1177 (8th Cir. 1981). (Pet. App. p. 38) But, as the passage quoted from Antoine makes clear, the claim in that case was based on the government's original failure to issue a patent for allotted land and could only be decided

in a suit against the United States. Antoine affords no precedent for Nichols.

In holding that the Nonintercourse Acts afford Indians a private right of action, the Court of Appeals for the Second Circuit said that private enforcement has been favored "because of the federal government's poor performance of its statutory obligation to protect the Indians." Oneida Indian Nation of New York v. Oneida County, 719 F.2d 525, 533 (2d Cir. 1983); aff'd as to liability, 105 S.Ct. 1245 (1985). When the injury to the Indians proceeds from the government's own malfeasance, when the United States itself has wrought a "grave mischief," the need for private enforcement becomes imperative. Yet this is the very circumstance that, according to the decision below, operates to take away that right. This is the apogee of injustice. The Indians' capacity to sue

on their own behalf to regain trust land of which they have been illegally dispossessed may not be so diminished.

CONCLUSION

For the forestated reasons the petition for certiorari should be granted.

Respectfully submitted,

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